UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Criminal Action
v.	)	No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, September 18, 2014
10:02 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
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Mechanical Steno - Computer-Aided Transcript

APPEARANCES:

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- and -
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On Behalf of the Defendant

P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:02 a.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Please be seated.

For a status conference in the case of United States versus Dzhokhar Tsarnaev, Docket 13-10200. Would counsel identify yourselves for the record.

MR. WEINREB: Good morning, your Honor. William Weinreb for the United States.

MR. CHAKRAVARTY: As well as Aloke Chakravarty for the United States, your Honor.

MR. CABELL: Good morning, your Honor. Donald Cabell also for the United States.

THE COURT: Good morning.

MS. PELLEGRINI: Good morning, your Honor. Nadine Pellegrini.

MR. BRUCK: Good morning, your Honor. David Bruck and Tim Watkins for the defendant, whose presence is waived.

THE COURT: Good morning.

As the parties have noted in the status report, there are a number of pending motions that have been fully briefed. I had hoped to have addressed the suppression motions by this point but have not quite completed that. I expect that to

happen very shortly.

Let me deal with a couple of the motions that are more procedural than substantive, although maybe one or two of these had some substance as well. There's a pending motion, second -- supplemental motion to compel discovery from the government concerning expert witnesses, which is Number 460, posed by the government. That motion is denied. I think the response has been sufficient under the rule.

A pending motion, Number 531, to supplement the record or for an evidentiary hearing on the motion to change venue is denied. The record is complete.

Number 548, a motion for leave to file a reply, is granted, and Number 550, a motion for leave to file a surreply, is granted. And 558, a motion for leave to file a reply, is granted.

Now, with respect to pending discovery matters, there are renewed motions by the government concerning the defense's obligation regarding reciprocal discovery and also a motion for a list -- a renewed motion for a list of mitigating factors. I would like you to address those, if you would. Let's take the reciprocal discovery one first.

MR. WEINREB: Your Honor, we have received absolutely nothing in reciprocal discovery from the defense, and their argument seems to be that they have no obligation to give us anything in reciprocal discovery until they have borne the

intention to use it at trial, which is what the rule states. But I think that rule has to be interpreted in a reasonable fashion. After all, the rule for the government is exactly the same. Our obligation under the corresponding rule is to produce things in discovery that we intend to use at trial, but no one would suggest that the government can wait until the day it submits its exhibit list to give the defense discovery in the case, nor would it be acceptable for us to simply give them everything in discovery and say we intend to use all of it without, you know, any distinction.

The defense made it -- this isn't the kind of case where the defense is simply going around gathering things at the last minute and therefore it might be reasonable for them to say, Well, we don't even have these things in our possession or we haven't had a chance to look at them; this is a case where the defense has been gathering materials and information from day one, and it's been 18 months.

If the defense has materials from among which they know that they will be drawing their exhibits, then I think a reasonable interpretation of the rule is that they need to produce those to the government in discovery. I think it was one thing for them -- you know, the local rules contemplate that the defense will provide reciprocal discovery a couple of weeks after the government provides its discovery. Clearly, now it's been a lot longer than that and we are on the eve of

trial.

The government needs these materials not simply to help strategize about what it's going to do in the case, but we have obligations coming up to provide reciprocal expert disclosures that may be influenced by what the defense is going to offer at the trial. We also, you know, are making decisions about which witnesses are going to be on our witness list, what exhibits are going to be on our exhibit list. And, again, this is a situation where -- because it's a death penalty case, where if we don't include somebody on our expert list, then arguably under the statute -- unless they're on the witness list three days before trial begins, the defense would have an argument that they can't be called. So we need reciprocal discovery in a timely fashion.

The Court ordered that it be provided. Nothing was provided. So we would ask that the Court craft some kind of remedy, a reasonable one, that does not necessarily commit the defense to using any particular item at trial or that does not necessarily preclude them from adding things that they may acquire after this date or that may suddenly become clear to them that it's a necessary exhibit, but some basic reciprocal discovery among the items that they reasonably believe -- or have reason to believe that they will be offering as exhibits at trial or that fall into any of the other categories of reciprocal discovery. We would ask that we receive those

forthwith.

THE COURT: Mr. Bruck?

MR. BRUCK: Thank you, your Honor.

This litigation, this motion, is inextricably intertwined with the continuance. The problem which we clearly have failed to persuade the government of is that we are so far from having the case prepared to present that we cannot possibly identify which exhibits will illustrate testimony that has yet to be developed. We know where we're going with our case, but we don't have the case.

Now, it is not true that there is some equivalence between the defense and the prosecution discovery obligations because the prosecution must turn over both that which is -- they intend to use and that which is material to the preparation of the defense. We do not have any obligation to turn over anything which is material to the prosecution. So until we are at the point of having our case essentially in an outline form ready to go, the identification of which items will illustrate or corroborate specific bits of that narrative simply cannot be done.

The other thing that I think -- which we pointed out in our reply which was just filed yesterday afternoon which is very important to remember is that basically our client's entire life was seized by the government. In terms of virtually every manifestation of his existence for 19 years on

this earth, they have it. They have everything out of his house. Truckloads of stuff. They have everything from his computer. They have everything from his social networking sites, government files for immigration. Not just him but his entire family. They have the contents of his dorm room. They have the contents of his friend's apartment at college. And the list goes on and on and on.

The large majority of documentary exhibits -- and this is all we're talking about -- and physical exhibits and photographs that are likely to turn out to be relevant to what we intend to prove at trial and at sentencing we've already gotten from the government in discovery. We don't have to give it back to them under Rule 16. They're talking about the little -- sort of the small group of things that we've collected so far, and there aren't that many, of physical items, not testimony. At one point they refer to -- we have to turn over all the information that we're going to use. Well, that's not what the rule requires; it's stuff: documents, photographs.

We are hard at work halfway around the world collecting as many of those items as we can. We are, as the Court well knows from sealed submissions as well as from our public pleading, way, way behind in that process. If Mr. Weinreb knew how little there is to even theoretically dump on them they probably wouldn't have brought this motion, or

they certainly wouldn't have pressed it with such a sense of urgency.

So that's the problem. We could, I suppose, collect some things that, you know, have to do with our client that the government doesn't have. We couldn't -- and give it to them and let them scratch their heads over it, but that's not going to advance anybody's preparation for trial, and it's not responsive to the rule because we don't intend to use whatever we happen to have. That's not how one prepares for trial.

So that's the problem we're in and that's why I say that this really is inextricably bound to the matter of continuance. We will do what the Court requires, but I don't know how we can turn over things that we intend to use when we're simply not at that point yet.

THE COURT: When you refer to preparing your case, are you referring to two phases?

MR. BRUCK: Yes.

THE COURT: Is it possible for you to respond to the Rule 16 category with respect to a guilt phase?

MR. BRUCK: It would be considerably easier. You know, we have not separated things out, but there's going to be a great deal less. And I --

Excuse me.

(Counsel confer off the record.)

MR. BRUCK: We are not -- we would not be ready this

morning to make disclosures on the guilt phase. I think if they were staggered we would be in better shape on the guilt phase than on the penalty phase. Considerably better shape.

THE COURT: Mr. Weinreb?

MR. WEINREB: Your Honor, if I could just respond briefly. I didn't address the reciprocal or the affirmative expert disclosures that the Court ordered. I thought that was coming second, but I realize now that's part of this same motion and I should address it because one of the most important things that we need from the defense is their affirmative expert disclosure. They have moved several times to delay that. The Court gave them delays but then ultimately ordered that it be produced, and the only thing that was produced was the name of one expert with no summary whatsoever of what the testimony would be at trial or any underlying -- any information about the underlying bases or reasons for -- or any documents or any discovery or anything underlying it; simply a social worker to testify about his life history.

Again, the defense argument seems to be that, Well, this expert hasn't completed her work. We can't give you a summary of her expected testimony because she's still formulating it. But that, in our view, takes the matter and stands it on its head. The Court set a deadline, and the purpose of the deadline is to require the expert to come up

with whatever the expert's going to say by the deadline, and that way there can be discovery in advance and you can have an orderly progression to trial and neither side is surprised by the other and both sides are in a position to identify reciprocal experts.

We have several affirmative experts, as the defense and the Court knows, and they very much would have liked additional time to conduct their analyses of the underlying materials and to develop their opinions. But the Court set a deadline and we told them they had to abide by it. And so we produced in great detail what they were going to say at trial and what documents or computer programs they were going to rely upon, and we expected the defense to do the same.

I don't think the defense can be heard to come in here and say that once a deadline has been set, Well, that just doesn't give us enough time. It's for the Court to set the deadlines and the parties to comply with them, not vice versa.

As for the argument that there's very little reciprocal discovery, that seems to cut the other way. If the government has everything already that the defense intends to offer during the trial, let them say so. And if there are additional materials we haven't produced to them and that they have collected on their own and it's just a small number of additional materials, let them produce it. Nothing requires them to offer it at trial.

But the way it stands now they are essentially coming up with an argument for not producing discovery which would arguably allow them to wait until the day before trial or whenever they compile their exhibit list to say, Okay. It's not until today that we've decided what we intend to use.

And that's where this is headed. Unless the Court continues the trial so far ahead into the future that the defense finally feels like they have enough time, then what we can see coming is that we're going to hear that no amount of time is enough time and there's never going to be any disclosures.

THE COURT: What you need first is what they would offer in a guilt phase.

MR. WEINREB: Well, your Honor, we have a deadline of October 1st to identify reciprocal experts that we intend to use during both phases, guilt and penalty phase, and how can we do that if we don't have expert discovery, their affirmative penalty phase expert discovery? And in addition to that, we really need all the reciprocal discovery because the experts will be -- in the rebuttal part, or the responsive part, of the penalty phase will be addressing what they intend to put in during the penalty phase which may take the form of a document or it may take the form of an expert's testimony.

And even beyond that, our identification of witnesses and exhibits that we intend to offer during the guilt and

penalty phases, which will be due at some point in the future, you know, as the trial approaches, that also will be influenced by what they intend to offer.

So we really can't wait for the penalty phase information until some later date, certainly not after the trial has begun and not even too close before the trial has begun because we're going to be locked into what witnesses we can call and to some degree by circumstances what exhibits we can put together and offer.

THE COURT: All right. Let's turn to the second motion regarding a list of mitigating factors.

MR. WEINREB: Your Honor, we briefed the law on that in our first motion. It's clear the Court has the authority to order the disclosure of a list of mitigating factors. It is in keeping with the principles of federal trials that the parties should not be surprised by one another's presentations. It's also in keeping with the spirit of the Federal Death Penalty Act which gives each side a chance to rebut what the other side has to offer.

And we'd also argue that it's important for us to have a list of mitigating factors for the jury selection process because when the jurors -- when we're trying to decide who can be a fair and impartial jury, the government needs to know what arguments are going to be made to them, what types of evidence are going to be offered to them, so that we can question

whether that's going to trigger some kind of response on their part that will prevent them from being fair and impartial.

Again, we're not asking that the defense, in a brief, you know, give us their entire mitigation case. We're talking about a list of mitigating factors. Eventually there will have to be a list because the jury votes on each one independently. And, you know, at this point undoubtedly the defense knows what their mitigating factors are. They may not know every last one, and we're not arguing that they can't amend the list down the road if another one shows up that they in good faith couldn't have included on a list today. Obviously, they could always delete items also if they decide that they don't want to pursue a particular avenue.

But it's clear that there's no legal or constitutional obstacle to the Court ordering such a list, and it would serve a lot of beneficial purposes. And the defense is in a position to produce one. They don't really say they're not; they just say they don't have to.

The other argument the defense seems to make about the mitigation case is that they've already told us essentially what their mitigating themes are during their presentation to the government to -- back when the attorney general was deciding whether to seek the death penalty, they identified certain mitigation themes. And if they tell us today that those are the only themes that they're going to produce, then

we've got our answer -- I'm sorry -- they're going to pursue, then we've got our answer.

But if there are additional mitigating factors, or if they're going to elaborate on those in ways that they didn't at the time, then we need to know about them so that we can write a useful jury questionnaire, we can ask useful questions during voir dire, and we can begin to prepare to fulfill our statutory obligation to rebut their mitigation case once the trial begins.

THE COURT: Mr. Bruck?

MR. BRUCK: Well, there are reasons why virtually no federal court has ever done this and there's a reason why Congress rejected this proposal when the Justice Department proposed to add it to the Federal Death Penalty Act in the Federal Death Penalty Reform Act of 2006, which never made it out of the House Judiciary Subcommittee. There was a hearing on it, and one of the objections that was raised, and it seemed to have some force, is that there is a constitutional problem.

If you look at the list of statutory mitigating factors, most of them assume guilt. Many, many statutory and non-statutory mitigating factors also assume guilt. So to provide the government with notice of what the -- and to allow the government then to put that -- which has never been done, to put this into a jury questionnaire and then start questioning jurors about mitigating factors received from the

defendant that have been filed -- their motion is to file these, absolutely tramples on the Fifth Amendment.

I think that's probably why Congress -- who knows why Congress ever doesn't or does anything, but I think it's fair to say that was a very good reason why this was not enacted. Now the government says, Well, the Court should do it anyway. Almost no courts have ever done anything like this. No court whatsoever has ever required a list of mitigating factors prior to the formulation of the jury questionnaire. This is absolute uncharted seas.

The government does basically know -- they've known from day one what some of the more important mitigating factors in this case are. Some of them are statutory. They can certainly question jurors about major issues in the case without the defendant having filed a notice that has not been required of any other defendant in virtually any other case.

There's some cases that we've distinguished, two or three out of the hundreds of federal death penalty prosecutions that have taken place since 1988 -- or 1994. This is just something they don't need, they're not entitled to. The law doesn't provide for it. There is absolutely an asymmetry between the notice requirements of the government in the statute and the nonexistent notice requirements in this respect for the defendant, and we don't think that there is any reason, any basis or any logical need for the Court to create one.

MR. WEINREB: I'll just respond briefly to the Fifth Amendment argument.

As we stated the last time this motion was argued and as we cite in our brief, there is no Fifth Amendment obstacle to the defense having to reveal things that they will have to disclose anyway when -- later on in the proceedings. The federal rules require that a defendant give advance notice of a claim of insanity, a claim of public right and other defenses that arguably involved the defendant admitting engaging in conduct that the government would normally have to prove during the liability phase.

In this case in particular there's no argument, I think, that can be made that in identifying mitigating factors the defendant is admitting guilt. The defense has made no secret of the fact that for the past 16 months it's been doing quite an expensive mitigation preparation preparing what its mitigation case will be if the defendant is convicted.

There's, you know, little difference in identifying what the mitigation themes will be than in saying that there's going to be a mitigation case. For example, saying that the defendant was 19 years old and that's a mitigating factor, that's not something that implicates whether he's guilty of the crime or not.

To the extent the defense has concerns about particular mitigating factors and their being disclosed to the

jury through a public filing, the government doesn't have any objection to them filing the list under seal. The government obviously is not going to say in a jury questionnaire that the defense will assert this or the -- the government obviously is going to be -- will respect the defendant's right to stand on his presumption of innocence throughout the proceedings.

But there's no actual Fifth Amendment problem in the sense that the Supreme Court has made it clear that the Fifth Amendment -- the defendant's right against self-incrimination is violated only if his words are actually introduced against him in trial -- that's a far cry from the defense identifying mitigation factors in advance of trial -- but there's also no violation of the spirit of the idea that a defendant should be permitted to stand on his presumption of innocence throughout the trial.

Stating what one will argue in the event of a conviction is a far cry from admitting guilt or from -- an even further cry from the government trying to use a defendant's own words against him, which is obviously nothing close to what the government is asking for here.

And then finally, I'd only say about Mr. Bruck's claim in this argument, as in so many arguments, that this has never been done before in a federal death penalty case, that the cases speak for themselves. They were only able to cite one case in which a court sided with them on this issue. We found

several cases in which the court sided with the government. And you simply can't draw from silence the inference that the courts rejected the idea.

The motion may never have been made. The defense may have simply produced the list. The parties may have simply never litigated it. It may have never made it into a recorded decision. It's simply not a basis for a legal argument to say, Trust me, it's never been done that way.

THE COURT: All right. I'll reserve both of those motions and resolve them shortly.

With respect to the motions to change venue and to dismiss the indictment, those matters will be resolved on the papers which are, as I said earlier, complete.

With respect to the motion to continue the trial date, I do invite argument focused on the preparation in light of the volume of production by the government. The other two arguments I don't need argument on, so...

MR. BRUCK: I'm sorry. Focused on the preparation in light of -- I didn't catch the Court's --

THE COURT: "The volume of potentially relevant evidence" is the way it's phrased in the motion.

MR. BRUCK: Yes. And that is the one issue you wish me to address?

THE COURT: Yes.

MR. BRUCK: Well, as we have explained in the papers,

this is a case with an enormous amount of evidence that has been produced by the government. It has been produced in ways that we've explained in the papers, in fits and starts, in ways that have been extremely difficult for us to grasp, to use, to understand.

The government informed the Court that automatic discovery was complete in -- as of, I think, September of 2013, and then that date has continually moved back. And now it turns out that we're still receiving reports of examinations that should have been part of automatic discovery as recently as a couple of weeks ago. And these are -- have been the matters that have absolutely been central to the case; for example, a partial, incomplete, undated FBI analysis of the defendant's computer giving the FBI analyst's versions of when various items were placed on that computer.

These are -- this is what is important about this case, and we did not receive that last September. We have no idea when this analysis was complete. We've received it within the last couple of weeks. Our preparation on those sorts of critical issues begins now.

I mean, we have been working as much as we could by our own lights trying to figure out what the government's findings were going to be, what their allegations were going to be, but it is only -- it is really only recently that we're able to focus the issues and begin getting our own experts

identified, appointed and tasked with the issue of responding.

And this is -- the government has focused on a single computer, the defendant's, which is obviously strategic. Their goal appears to be to try to show that Dzhokhar Tsarnaev self-radicalized as an isolated individual all by himself without any context, any explanation, without anything working on him or influencing him. That's their case for the death penalty and that's what we have to respond to.

That means that we now have to seek out the analysis that the government did on all of the other digital devices, on hundreds of megabytes of materials from Tamerlan Tsarnaev and all the other digital devices that were seized in this case and find out what the government has to say about them. We still don't know.

These are -- in addition to that we have -- we have just learned that there were 100 --

THE COURT: I just want to be sure I heard that correctly. You have to know what the government thinks about evidence it won't use? Is that what you're saying?

MR. BRUCK: We have to -- the government has, we are confident, done -- has reports and examinations which were discoverable under automatic discovery as soon as they were produced, if they weren't already last September of 2013, that we should have had under Rule 16(1)(a)(F) [*sic*] that we still don't have, and those are about the critical issues in the

case.

In addition to that, we have -- we have gradually received masses of FBI reports of examinations, again, in a confusing and difficult-to-use and scatter-shot fashion. We now know there were 177 FBI scientists and technicians that have worked on this case alone, and to that within the last six weeks or so we've been in a position of having to find out what we're going to do in response, what experts we have to retain or what *Daubert* challenges are appropriate in those cases.

It is the way that this massive amount of information has been produced to us and the delays and the slowness with which anything that we could actually do anything with has been produced has set us back and back and back until now almost all of the work that we have to do to respond to the government's case is compressed into the next six weeks, while we're trying to get ready for the process of jury selection and jury questionnaires and all the other things we have to do.

This is all set against the part of the case that you have not asked me to address but with which the Court is familiar, which is the tremendous obstacles that we have encountered in investigating the case in mitigation. And I mention that not to go into it, because I can't go into it in this setting and because you have not invited argument on that point, but simply to show what we've been busy with.

It is not as though we have been failing to use our

time. This -- we are faced with a massive array of government, 7-1/2, whatever it is, terabytes of electronic discovery, this enormous array of scientific and technical evidence from the government. The Court may recall a very, very slow fits-and-starts process of physically being able to examine the government's evidence in Quantico and here during the spring and late winter of last year. All the way through we have hit delay after delay after delay in trying to get our arms around this massive case.

Now, this is all in the context of how relatively expedited this trial schedule is. Now, I recognize and I agree with the government's position that every case is different, and one cannot make facile comparisons between one case and another. But in terms of answering the question how much time does this case require, I think we are faced with an example of Justice Holmes' famous statement that the life of the law is not logic; it is experience. And the experience that we have to guide us, I would suggest, is the collective experience of the federal courts throughout this country.

We have provided the Court with not a sampling or a selection but with time-to-trial statistics, indictment to trial, in all 119 federal capital trials that have gone to trial in the last decade, and this case has been set until now on a schedule half the median of those cases.

Now, the cases are different in lots of different

ways, but when one faces the -- when one looks at the entire picture of how long these cases take to go to trial, I think it has to give one pause that the reason that we are so far behind is not, as the government says, because of things of our own making but that there has just been too much to do.

We look at the typical time to trial, the median time to trial -- we haven't asked you to look at the average time to trial which is much longer, because that can be affected by a handful of outliers -- and then we look at the facts of this case. This is a case that is atypical because one would think, and, in fact, it has proven to be true, that it takes longer to get this case ready for trial, not a shorter period of time, than in the run of federal capital cases.

So that is -- I could go into more granular detail about the question of the size of electronic and other physical discovery and scientific testing if the Court wishes. It's in our papers. But standing back and looking at this entire picture, it is clear that this case is atypical because it is far more complex, far more difficult to investigate from the point of the defense than the typical average or median federal capital case.

Out of 119 cases, we did point you to two that involved Russian or former Soviet Republic nationals. Those cases took four years and five years to reach trial. They involved mitigation investigations in the Ukraine and in

Russia.

Now, we are not for a moment suggesting that this case ought to take, nor are we asking for, four years or five years to get ready. But the point I think is undeniable that this case is atypical because of its complexity, because of the factors that require it -- that will require more time, not less time.

So I just think that while I realize that the Court's decision has to be based on the evidence in this case and on the particular factors that you have before you, I think it is helpful to view this case in context in answering the question how much time is enough, is our inability to meet this trial date the product of our own doing or is it simply, as we've submitted in our papers, that the job it too big and the time is too short?

Now, I would be surprised if the Court doesn't feel some frustration over the fact that when you set the trial date we said we don't think that's going to be enough time and now we're back here saying it wasn't enough time. All I can say to that, your Honor -- and I think you have followed the progress of the defense mitigation investigation overseas in the funding requests and in some of the submissions that have been made here. All I can say is that we have done our best to meet this trial date. We have not for a moment thought, Well, we'll just come back in September and ask for more time. That is not the

way we approached the trial setting in this case. But it cannot be done.

Now, I rise primarily to advance -- obviously to advance the defendant's right to a fair trial, but there is a broader interest here as well. When this occurred, on the day of the bombing President Obama came to the White House pressroom and made a statement. And at the end he said, "We will get to the bottom of this and we will find out who did this and we will find out why they did this."

We are part -- we, the defense, are part of the process of getting to the bottom of this and perhaps of finding out why, which is the question everyone, everyone wants answered. We cannot play our role unless we have the time to do it.

Now, it is in no one's interest, no one's interest, none of the people who have suffered so grievously as a result of the Boston Marathon bombing, for there to be half a trial or three-quarters of a trial and for the truth that could be developed never to be developed and never to come out, for us not, in the President's words, to get to the bottom of this.

So I would suggest to the Court that there are the gravest reasons to ensure that both sides, not just the government, has the time to do our job. If the idea of a delay in this case is distressing to people who have been affected by this, that distresses us too. The last thing we want to do is

cause any more grief to people who have suffered so much grief already. But as I say, I don't think it will help anyone for this case to be tried before both sides are ready, before all the evidence can be developed.

If the government had not asked for the death penalty, this case would probably be over by now. It might have been over a long time ago. It would have been over a long time ago. So that's what we're concerned with and that is the issue -- those are the issues which require so much time for us to investigate. And we ask that the Court give us the time we need and ensure that this case is fair to the defendant and fair to everyone.

Thank you.

MR. WEINREB: Your Honor, the question isn't whether the government shares the defense's desire to get to the bottom of what happened here, because of course we do, but the question is simply how much time should be allowed to get to the bottom of it. In answering that question, we would submit that the relevant pool of experience or the area of experience the Court should draw from is not the collective experience of other judges in other cases whose experience in those cases is really unknowable and can't be known just through looking at statistics, but the Court's own experience in trying cases in this courthouse.

And I would wager that the Court's experience is that

if the parties are given three years to go to trial, they will spend three years trying to get to the bottom of what happened, and if they're given two years, they will get ready in two years, and so forth. However much time you have is your budget of time, and you tend to focus on what is most important in light of the amount of time you're given.

We submit, as we did back when you proposed the trial date originally, that this was a reasonable amount of time to get to the bottom of what is going on here, and the parties have both been working very diligently to achieve that goal. And the government is confident that if this case goes to trial on November 3rd the jury will be fully informed and will be able to make a fair and impartial decision about what happened.

The defense, undoubtedly, given one, two, three, however more years of extra time, could continue gathering more and more and more information, but there comes a point where more and more information doesn't really help you get to the bottom of things. And I think that the Court has -- although we, of course, aren't privy to the defense's funding requests and their requests for experts and personnel, we know enough to know that they have been doing an extremely diligent and thorough investigation of the case and they are experienced counsel and we have no doubt that they have managed to do an excellent job and we expect that the jury will benefit from that. The government has endeavored to do a similar kind of

job and we hope the jury will benefit from that as well. We don't think that simply allowing more and more time will materially improve the jury's understanding of the case, and that's why we have opposed the defense's motion.

An example of the importance of budgeting time may be -- one of the best examples is the computer evidence, since that's what Mr. Bruck focused on in the beginning of his argument. And to that end, we understood that the computers of the various people involved or who in the indictment -- have been charged in the indictment would be important to the defense, and so we provided them with forensic copies of those computers even before the deadline for automatic discovery was due. Presumably, they have hired a computer expert who is in the same position to analyze those computers as we are.

They fault us for not doing a -- the kind of analysis of Dzhokhar Tsarnaev's computer that they would have liked to have seen earlier until the time that we did it, but they were free to do the same thing from the start. They were free to focus their fire power, their energy, their time on analyzing that computer.

THE COURT: Let just ask you, is this an FTK analysis?

MR. CHAKRAVARTY: Yes, this is an FTK analysis. But as we said in the beginning when we argued this in the motion to compel the production of FTK analyses, FTK is simply a tool for looking at a computer. And FTK has been used by the

government to look at the computers, but we did not -- the FBI did not produce reports of the type that the defense is interested in until now because we were simply investigating them until now. It's not until the government gets ready to begin the -- identifying the exhibits it's going to use at trial that we ask the FBI to make sort of a formal report that we can potentially introduce into evidence or at least give to experts and have them rely upon in their testimony.

(Counsel confer off the record.)

MR. WEINREB: I should also clarify the types of reports that we're talking about here aren't simply the raw output of an FTK examination of a disk, which can be done by anybody with the FTK software very easily. It's a narrative report by the agent commenting, basically summarizing what the agent will say about a particular byte of computer evidence. It's like an expert report.

The government takes the position that it's not really expert testimony because it's not -- it's just the use of a commercially available software program. But nevertheless, we do have them produce reports, just like I'm sure the Court has seen drugs expert reports and ballistics experts' reports where they sort of narrate the results of their examination of various things. Those are the reports -- that's the report that was recently produced with respect to Dzhokhar Tsarnaev's computer because it was only recently produced by us and we

produced it as soon as we created it.

Let me address a different question. Now, the defense says that the government's theory of the case is that Dzhokhar Tsarnaev self-radicalized in isolation from everybody, his brother, his family, other people in the world, you know, that we intend to produce -- to introduce his life out of context. That's not the government's theory. But it is the government's obligation to prove Dzhokhar Tsarnaev guilty of these offenses. He is the person charged in the indictment. He's the person for whom we have noticed an intent to seek the death penalty.

Tamerlan Tsarnaev is not on trial. Other people in the defendant's family are not on trial. So the government obviously is not going to be doing the same kind of examination of other people's computers or other people's possessions as we're going to do of the defendant for whom we have the burden of proving guilt beyond a reasonable doubt and prove aggravating factors in a penalty phase.

To the extent we do create such reports, we'll produce them. But the defense here, they're not novices at this. They've known from the start, from the very beginning of this case, that their theory would be that Dzhokhar Tsarnaev was induced or influenced or somehow affected to commit this crime, if he did, if that's what is found, by his brother. And so they've had his brother's computers, phones, everything from the very beginning of the case, and they could have had a

computer expert doing the exact same kind of analysis that they're now saying the government should have done and should have given to them sometime early in the case.

If they chose to spend their time and energy doing other things, that was their decision, but it's not an argument for a continuance for them to turn now and say, Well, since the government didn't do it for us, now we have to. Now we're six weeks before trial, and now we have to do it for ourselves. They could have done it 18 months ago.

With respect to all the computer evidence, which they claim is the most important evidence, we gave all the most important devices to them before automatic discovery was due, and all the others were made available for them to copy and examine, if they wanted, many, many months ago. Not now, not six weeks ago, many months ago.

With respect to the expert testimony with which they say they've been overwhelmed, everything that we gave them, as we've said before, is what they requested. Yes, many, many experts looked at the evidence in this case, not necessarily for use in the trial, because anytime that there is a terrorist act or the use of IEDs, the FBI analyzes how they were made, how the components were obtained, various other features of them in order to disseminate that information to other -- to the intelligence community and to other law enforcement agents to help them try to forestall a future attack, to see it before

it's coming.

They asked for all of that and we gave it all to them. The defense then came to -- filed a motion with the Court saying that they were overwhelmed, it wasn't -- it was too much for them, they couldn't sort through it. The Court ordered the government to identify for them precisely which experts we would be using at trial and exactly what they would be relying on, and we did that and they have that.

And most of that information is not complicated stuff. It's fingerprint evidence, DNA evidence, ballistics evidence, the kinds of things that defense attorneys deal with every day, that experts are familiar with. It doesn't take very long to take -- to look at a set of fingerprints and determine whether the analyst did the match correctly or not. So I don't believe again that that is certainly not grounds for a ten-month continuance.

I simply think for the defense to try to blame the government for their difficulties in investigating the case is unfair. You know, we have been -- we have been giving them copious amounts of discovery all along, made every effort we can to accommodate them and have met the Court's deadlines for the production of various matters.

So we agree that this is an unusual case in some respects, but in some respects it's a less complicated case than many because the evidence in this case is going to -- this

is not a case where we will be trying to piece together our proof of the defendant's involvement through very complicated or far-flung pieces of evidence. We will be offering videotape. We'll be offering, you know, basic forensic evidence that links the defendant to the crimes. And the defense may want to go very far afield themselves in an effort to try and challenge that evidence, but the point of setting a trial date and sticking to it is to cabin that effort and, you know, force the parties to exercise some degree of self-restraint and reason. And that's what we believe the Court has successfully done with this trial date, and so we would encourage the Court to either keep the current trial date or, if the Court's inclined to continue it, to continue it for a very short period of time, not the ten months that will simply continue what's been going on so far for another ten months with perhaps very little productive value.

THE COURT: I would like to see two things: One is the government's disclosure as of September 2nd pursuant to the order, which I don't think is in the record -- it wouldn't be normally -- and, secondly, the report that's been referred to by both of you. And that can be submitted -- I leave it to you, I guess. I don't know that it has to be submitted for entry on the docket. I would just like to review it.

MR. WEINREB: Very well.

THE COURT: Mr. Bruck, anything else?

MR. BRUCK: Just one moment.

(Counsel confer off the record.)

MR. BRUCK: I think that's it, your Honor, except, again, with reference to the parts that we have not addressed.

THE COURT: Well, you have, actually.

MR. BRUCK: I'm sorry?

THE COURT: You have, actually.

MR. BRUCK: Well, I mean, Mr. Weinreb was complaining earlier about our failure to produce a more detailed -- or really any detail about our social historian/social worker expert. The Court knows what has happened with that, knows the problems that have been encountered. And this is all part of really unforeseeable reasons why we stand here today in need of a reasonable continuance. Thank you.

THE COURT: All right. I'll reserve on the matter and let you know shortly.

The parties have submitted what's called an "Agreed-To Proposal Regarding Procedures For Jury Selection." That tracks pretty much what I had been thinking and talking with the jury clerk about. It's, as I'm sure you all appreciate, based on our recent experience with high-profile trials.

I don't want to set precise timetables right now. I want to kind of work it in conjunction, perhaps, with the jury clerk, but it's very close. In other words, we'll send out a large number of summonses, bring people in, have them fill out

questionnaires, let you review the questionnaires, do some of the strikes on paper, basically, and get down to a place where we'll be interviewing people in actual voir dire. So the general template is one that we'll follow.

Now, assuming for present purposes no change in the schedule, we have a pretrial conference -- the final pretrial conference set for October 20th. I guess my first question is: Is there any need for an interim conference before that that we can anticipate? I mean, there might be issues that arise that would cause it, but would there be any reason -- I would think not, I guess is my position, but...

MR. WEINREB: Your Honor, I would think if we need one, we can always ask for it.

THE COURT: Fair enough.

Now, I don't know whether you have, with respect to the pretrial conference, conferred about other disclosures such as witness lists, *Jencks* material. Has there be any conversation among you about those matters?

MR. WEINREB: Not yet, your Honor.

THE COURT: It's getting time to do that, isn't it?

MR. WEINREB: Yes, we will do so.

THE COURT: Okay. Maybe a joint or several schedule? Could we ask for that in two weeks?

MR. WEINREB: That's fine with the government.

MR. BRUCK: Yes.

THE COURT: Okay. We're coming to the point where we'll have to do an October budget. If you could -- let me look at the calendar. A week from today, is that -- that's the 25th. Is that possible?

MR. WATKINS: It's possible, yes.

MR. WEINREB: Your Honor, we'd ask that the defendant be present for the pretrial conference. We haven't seen him since the arraignment, and just in case any issues arise that require waivers on the record or any other reason.

THE COURT: Colloquies?

MR. WEINREB: I think that would be best.

MR. BRUCK: Can we reserve that until the government identifies whether there are any such issues?

THE COURT: Yeah, I think so. I mean, I guess it's the defendant's principal decision whether to be here or not. If it's necessary for him to appear so that he can answer or make his position plain on some pertinent issue, then we can require it.

MR. WEINREB: I just -- even in the absence of a pre-identified issue, I think in a case where we haven't heard from the defendant from the date of the arraignment until now, just to ensure that no issues are going to arise later that --

THE COURT: Well, it will come at some point. There's no question about it. Whether it has to be the October 20th occasion or some other.

That just reminds me. I don't know in your consideration of jury selection procedures if you've considered the defendant's presence and participation in those matters. Have you?

MR. WEINREB: Well, your Honor, the defendant has a right to be present for jury selection, and we'd ask that he be there.

THE COURT: That would be the normal arrangement.

MR. WEINREB: Yes, to protect his rights and make sure no issues arise there.

THE COURT: I want to be sure if there are any issues about that we know about it and plan accordingly.

MR. BRUCK: We'll certainly take that up with him and see whether he has any wishes. It can be a protracted process. But we'll talk to him about it and report to the Court our decision.

THE COURT: As you know, in the large empanelment cases in the past we've used something other than the courtroom in the initial stages which requires some logistical decisions, and that's one of the things I'm interested in.

MR. BRUCK: I am confident that he will not insist on being present for large -- for settings in which there would be logistical difficulties in his being present, if that's what the Court is concerned about.

THE COURT: Well, as I understand it, not having been

there, in the Bulger trial, for example, the pools that were originally called in were addressed by the Court in the jury assembly room with the defendant present and defense counsel and government counsel all present so they could be identified to the prospective jurors at that time. That would be a normal course. What's not normal about it is that it occurs someplace other than the courtroom which is our usual venue, and as I say, that may present some logistical issues.

MR. BRUCK: I don't see a problem either way, and we have no strong view about this at this point, but what I'm trying to suggest is that we will work with the Court on it.

MR. WEINREB: Your Honor, we have no doubts whatsoever about counsel's qualifications or competence or capability, but things sometimes happen after trials that are different during trials. This is an example of a situation where if the defendant's going to waive his presence at jury selection, we would like to have it on the record and not have a question arise later about whether there was any kind of objection.

THE COURT: I think that's prudent.

MR. BRUCK: That's fine.

THE COURT: Well, let me -- this is sort of in the area of administrative matters, I guess. Let me just clarify for the defense our manner of seeking to file replies or other papers that are not in the ordinary course, the normal course is to file a motion for leave to file the reply with the reply

attached as a proposed reply and then to -- if the motion is granted, to file the reply. You'll see the contrast between the recent flurry of yours and the government's. The government was doing it the way we usually expect it to be done.

MR. BRUCK: Very well.

THE COURT: Are there other issues at this time?

MR. WEINREB: Once again, your Honor, we'd ask that the time from now to the next status conference be excluded on the grounds that this is a complex case and it's in the interest of justice.

THE COURT: I think that's plainly true. Is there any dissent from that?

MR. BRUCK: No. No objection to that, your Honor.

THE COURT: So ordered.

All right. Thank you. I'll, as I say, attend to the pending matters shortly.

We'll be in recess.

THE CLERK: All rise for the Court.

(The Court exits the courtroom at 11:05 a.m.)

THE CLERK: Court will be in recess.

(The proceedings adjourned at 11:05 a.m.)

C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSO, RMR, CRR
Official Court Reporter

Date: 9/26/14